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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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THE PEOPLE ex rel. SACRAMENTO  
METROPOLITAN AIR QUALITY MANAGEMENT  
DISTRICT,

Plaintiff and Respondent,

v.

ATIK AMAN et al.,

Defendants and Appellants.

C062335

(Super. Ct. No.  
06AS02948)

Plaintiff Sacramento Metropolitan Air Quality Management District (the District) sued defendants Atik and Rangina Aman for violations of District rules after the Amans sold gasoline at their gas station without an operating permit, and continued receiving fuel deliveries without upgrading their vapor recovery equipment as required by law. The trial court entered judgment against the Amans in the amount of \$169,750.

On appeal, the Amans contend (1) the trial court erred in excluding evidence of the Amans' financial condition, (2) the penalty is excessive and arbitrary, (3) the Amans detrimentally relied on the District's implicit authorization for the Amans to continue receiving gasoline deliveries without an equipment upgrade, and (4) as asserted for the first time in their reply brief, the trial court failed to consider the Amans' ability to timely complete the equipment upgrade.

We conclude (1) the trial court did not abuse its discretion in precluding the Amans from introducing evidence of their financial condition during closing argument after they had violated two court orders to produce such evidence in discovery and failed to offer any such evidence during their case-in-chief; (2) the penalty was not arbitrary or excessive and the trial court did not abuse its discretion in carefully considering the evidence and imposing a penalty that falls at the low end of the range specified by law; (3) the District was not equitably estopped to seek a penalty against the Amans because the District did not mislead the Amans, but instead warned them about their legal obligations, and the trial court found the Amans were not credible in claiming to have relied on the District; and (4) the argument that the Amans raised for the first time in their reply brief is forfeited.

We will affirm the judgment.

## BACKGROUND

The Amans purchased a Valero gas station on Stockton Boulevard in Sacramento. In the course of negotiating the purchase, the seller, Dr. Bains, handed them a plastic bag containing various licenses, permits and tags that Bains represented were the station's necessary operating permits. The plastic bag did not contain a District operating permit. Dr. Bains testified that "it was mentioned" that the station would require an environmental upgrade and that the purchase price was reduced by at least \$25,000 due to the required upgrade. Atik denies that the upgrade was mentioned during purchase negotiations and he denies that the purchase price was reduced based on the upgrade requirement.

After purchasing the station, Atik changed the record of ownership for each permit in the plastic bag. The Amans did not visit the District office because a District operating permit was not in the plastic bag.

The Amans took possession of the gas station in March 2005. District rule 201 requires every gasoline station to have a District operating permit. The Amans sold gasoline at their station for 79 days before obtaining a District operating permit.

In addition, the law required the Amans to install new vapor recovery equipment by April 1, 2005. (Health & Saf. Code,

§§ 41950 et seq.;<sup>1</sup> District rule 448) The upgrade was known as a phase I enhanced vapor recovery (EVR) upgrade, and involved a vapor recovery system used when receiving gasoline into a gas station's underground storage tanks.

The District issued an order of noncompliance to the Amans on May 24, 2005 because they did not have a District operating permit and they had not upgraded to the required vapor recovery system. When Atik received the order of noncompliance he applied for an operating permit. The Amans obtained a District operating permit two days later, on May 26, 2005.

The operating permit authorized the Amans to sell only the fuel already contained in their two 10,000 gallon storage tanks. Condition 6 in the permit expressly stated that they could not accept additional fuel deliveries until they installed the phase I upgrade equipment.

Nonetheless, following another inspection on July 29, 2005, the District issued a notice of violation to the Amans for failure to install the phase I upgrade. When the Amans still had not installed the upgrade by August 24, the District "red tagged" the station (placed red tags on the offending equipment as a further effort to stop fuel delivery). After the red-tagging, Atik took steps to install the upgrade, which was completed on August 29, 2005. The Amans had continued to

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<sup>1</sup> Undesignated statutory references are to the Health and Safety Code.

receive fuel deliveries after obtaining the operating permit but before making the equipment upgrade.

The Amans sold the gas station in late 2008.

The District filed this action against the Amans, seeking penalties for the violations. After a two-day trial, the trial court issued a 17-page statement of decision with detailed findings of fact. The Amans filed a notice of appeal on June 23, 2009. The trial court subsequently entered judgment on July 31, 2009, imposing a penalty on the Amans totaling \$169,750.<sup>2</sup>

## DISCUSSION

### I

The Amans contend the trial court erred in excluding evidence of their financial condition, because section 42403, subdivision (b) requires the court to consider the financial burden to the defendant.<sup>3</sup> We conclude that although section

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<sup>2</sup> The parties do not address the Amans' premature notice of appeal. "Nonetheless, since the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion." (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.) The Amans' notice of appeal indicated their intent to challenge the judgment after court trial. Accordingly, we exercise our discretion to deem the notice of appeal filed immediately after entry of judgment. (Cal. Rules of Court, rule 8.104(d)(2).)

<sup>3</sup> Section 42403 provides in pertinent part:

"(b) In determining the amount assessed, the court . . . shall take into consideration all relevant circumstances, including, but not limited to, the following: [¶] (1) The extent of harm caused by the violation. [¶] (2) The nature and persistence of

42403 identifies the financial burden as a consideration, the trial court did not abuse its discretion in this case because the Amans ignored court orders compelling such information and failed to offer such evidence in their case-in-chief.

In response to District motions to compel, the trial court issued two separate orders compelling the Amans to produce evidence regarding their financial condition. The Amans did not comply with the orders. When the second motion to compel was granted, the District sent a letter to the Amans informing them of the order. The letter cautioned them, in bold print, as follows: "Reminder: If you fail to produce the requested documents, we will make a motion at the trial to have the court exclude any evidence you attempt to use that is within the scope of these discovery demands."

The Amans did not produce the requested financial information to the District, and they did not introduce any evidence of their financial condition during the evidentiary phase of the court trial. Instead, the Amans first mentioned their financial condition during their closing argument. The District objected to any introduction of financial-condition

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the violation. [¶] (3) The length of time over which the violation occurs. [¶] (4) The frequency of past violations. [¶] (5) The record of maintenance. [¶] (6) The unproven or innovative nature of the control equipment. [¶] (7) Any action taken by the defendant, including the nature, extent, and time of response of the cleanup and construction undertaken, to mitigate the violation. [¶] (8) The financial burden to the defendant."

evidence during closing argument, and the trial court sustained the objection.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332.) "The court's "discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.""

[Citation.] Even where a trial court improperly excludes evidence, the error does not require reversal of the judgment unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) [The appellant] has the burden to demonstrate it is reasonably probable a more favorable result would have been reached absent the error. ([Code Civ. Proc.,] § 475; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431-1432.)" (*Saxena v. Goffney, supra*, 159 Cal.App.4th at p. 332.)

A trial court may exclude evidence not properly disclosed in response to a discovery request, even in the absence of a court order compelling such discovery. (*Pate v. Channel Lumber Co.* (1997) 51 Cal.App.4th 1447, 1454.) Here, the Amans did more than ignore the District's discovery requests; they repeatedly failed to comply with court orders compelling the information. (*McArthur v. Bockman* (1989) 208 Cal.App.3d 1076, 1081 [failure to produce evidence of financial condition in response to discovery requests allowed the trial court to preclude defendants from introducing evidence of their finances].) Moreover, they failed to properly move to introduce evidence of

their financial condition at trial. And they have failed in their burden on appeal to establish that a more favorable result would have been reached if the trial court had allowed such evidence.

The Amans rely on *Newland v. Superior Court* (1995) 40 Cal.App.4th 608 (*Newland*) to contend that discovery sanctions should not deprive a litigant of the right to have an issue decided on the basis of all admissible evidence. *Newland* is distinguishable. In *Newland*, the appellate court held that a trial court may not dismiss an action for failure to pay monetary sanctions for discovery violations. (*Id.* at p. 610.) In so holding, the *Newland* court noted that trial courts do have the prerogative to impose sanctions -- including exclusion of evidence -- related to improper refusal to respond to discovery requests. (*Ibid.*)

The Amans also rely on *Parker v. Wolters Kluwer United States, Inc.* (2007) 149 Cal.App.4th 285 (*Parker*), but that case does not support their position. In *Parker*, the Court of Appeal reiterated the well-settled rule that "[t]he power to impose discovery sanctions is a broad discretion subject to reversal only for arbitrary, capricious, or whimsical action." (*Id.* at p. 297, quoting *Calvert Fire Ins. Co. v. Cropper* (1983) 141 Cal.App.3d 901, 904.) The *Parker* court affirmed the imposition of terminating sanctions for a party's repeated and willful refusals to produce discovery. (*Id.* at p. 297.) *Parker* supports, rather than undermines, the trial court's exclusion of



the Amans' evidence regarding their financial condition after they repeatedly ignored the court's orders compelling discovery.

The Amans also argue that their status as self-represented litigants excuses their failure to produce the evidence in a timely and proper manner. We reject the contention because "mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

The trial court did not abuse its discretion in precluding the Amans from introducing financial evidence during closing argument.

## II

The Amans next contend the trial court imposed an excessive and arbitrary penalty. Again, we disagree.

To establish error in the trial court's determination of a penalty amount that falls within the range specified by statute, appellants must show an abuse of discretion. (*Ojavan Investors, Inc. v. California Coastal Com.* (1997) 54 Cal.App.4th 373, 395.) In applying the abuse of discretion standard in this context, "'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)" (*People v.*

*Hovarter* (2008) 44 Cal.4th 983, 1004.) Thus, "[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.)

The penalty imposed on the Amans has two components. The first totaled \$19,750 for operating without a permit as required by section 42402, subdivisions (a) and (d).<sup>4</sup> The second component of the penalty totaled \$150,000 for the Amans' acceptance of fuel deliveries into noncompliant tanks in violation of section 42402, subdivision (b)(1). The total penalty was in the lower range specified by statute.

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<sup>4</sup> Section 42402 provides in pertinent part:

"(a) Except as provided in Sections 42402.1, 42402.2, 42402.3, and 42402.4, any person who violates this part, any order issued pursuant to Section 42316, or any rule, regulation, permit, or order of a district . . . is strictly liable for a civil penalty of not more than one thousand dollars (\$1,000).

"(b) (1) Any person who violates any provision of this part, any order issued pursuant to Section 42316, or any rule, regulation, permit or order of a district . . . is strictly liable for a civil penalty of not more than ten thousand dollars (\$10,000). [¶] (2) (A) If a civil penalty in excess of one thousand dollars (\$1,000) for each day in which a violation occurs is sought, there is no liability under this subdivision if the person accused of the violation alleges by affirmative defense and establishes that the violation was caused by an act that was not the result of intentional nor negligent conduct. [¶] . . . [¶]

"(d) Each day during any portion of which a violation occurs is a separate offense."

The trial court found that the Amans did not intentionally or negligently operate their gasoline station without an operating permit during the period from March 8 until May 26, 2005. Nonetheless, section 42402, subdivision (a) imposes strict liability, authorizing a penalty up to \$1,000 per day even for nonnegligent and nonintentional violations of District rules. The trial court determined that a penalty of \$250 per day was appropriate because the Amans quickly sought a permit when they became aware of the requirement and the violation was "in the nature of a recordkeeping violation."

Regarding the phase I upgrade violation, the District sought a penalty of \$10,000 for each instance in which the Amans accepted fuel into noncompliant gasoline storage tanks between April 1 and August 25, 2005. But for each of the violations between April 1 and May 24, 2005, the trial court imposed a \$1,000 penalty. The trial court reasoned that the Amans did not negligently or intentionally violate the District's rule on vapor recovery systems prior to May 24, 2005, but that the \$1,000-per-violation penalty was appropriate because the dangerous and toxic nature of gasoline requires great care in its receipt and storage. As the trial court correctly determined, the \$1,000 per day penalty is authorized by section 42402, subdivision (a).

For the violations occurring after May 24, 2005, the trial court correctly concluded that the Health and Safety Code allows for penalties of \$10,000 for each of the days on which the Amans received gasoline shipments after being expressly informed of

the rules violation by a District representative. Thus, the trial court could have imposed a penalty totaling upwards of \$600,000 for the Amans' intentional violations of the District rule for phase I upgrade. But the trial court instead imposed a penalty of \$150,000 after considering admissible evidence regarding the relevant circumstances. (§ 42403, subd. (b).)

Among other things, the trial court considered mitigating factors such as the negligible harm caused by the outdated storage tank valves, the small scale of the Amans' gasoline business, the Amans' advanced age, and the doubtful prospect that they will operate another gasoline station. Nonetheless, the trial court refused to reduce the penalty to "a wrist slap" because the Amans failed to upgrade the storage tank valves "much longer than almost all other gas stations in [the] District's jurisdictional area." Compounding their culpability was their acceptance of gasoline "even after receiving actual verbal and written notice that their actions violated the law and that the violations subjected them to the risk of daily penalties." In addition, the trial court found that the Amans provided no viable excuse for the comparatively lengthy delay in upgrading their equipment.

The Amans again reiterate their contention that the trial court erred in failing to admit evidence of their financial condition in setting the penalty. However, as we explained in part I, the trial court did not abuse its discretion in rejecting the evidence during closing argument.

The Amans also urge us to compare the District's pretrial settlement demands with the penalty imposed by the trial court. We decline to make such a comparison. Evidence Code section 1154 provides that evidence of settlement offers and negotiations are inadmissible to prove the invalidity of the claim or any part of it. This provision promotes candor in settlement negotiations. (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1475, quoting *Carney v. Santa Cruz Women Against Rape* (1990) 221 Cal.App.3d 1009, 1023.)

The trial court's statement of decision shows that it carefully considered the circumstances in this case in determining the penalty. The trial court did not abuse its discretion and did not impose an arbitrary or excessive penalty.

### III

The Amans further contend that they detrimentally relied on the District's implicit authorization to continue receiving fuel deliveries because the District did not "red tag" the fuel equipment sooner. The Amans offer no legal authority to support their argument, and we reject their contention.

"[T]he doctrine of equitable estoppel is founded on concepts of equity and fair dealing.' (*Strong v. County of Santa Cruz* (1975) 15 Cal.3d 720, 725.) 'The essence of an estoppel is that the party to be estopped has by false language or conduct "led another to do that which he . . . would not otherwise have done and as a result thereof that he . . . has suffered injury." [Citation.]' (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16.) The

doctrine 'ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy. [Citations.]' (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793.)" (*Steinhart v. County of Los Angeles* (2010) 47 Cal.4th 1298, 1315.)

The District did not mislead the Amans by false language or conduct. To the contrary, the trial court found that the District gave the Amans express verbal and written warning on May 24 that it was unlawful to receive fuel deliveries into their noncompliant gasoline storage tanks. The trial court found that the Amans were not credible when they claimed to have relied on District advice to keep operating.

The Amans' assertion of equitable estoppel fails.

#### IV

The Amans presented an additional argument for the first time in their reply brief. The new argument asserts that the trial court failed to adequately consider the Amans' ability to comply with the equipment upgrade requirements.

"Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.) The Amans' failure to present this argument in their opening brief precluded the District from presenting any response. Consequently, the argument is forfeited.

The argument also lacks merit. The Amans invite us to reweigh the evidence concerning their ability to timely complete the upgrade repairs required by the District rule. But the trial court considered and rejected the same contentions when it found that the Amans provided no credible excuse for failing to make timely repairs to the storage tank valves. We do not second guess the trial court's findings of fact. (*Washington Mutual Bank v. Blechman* (2007) 157 Cal.App.4th 662, 670.) The testimony at trial supported the trial court's findings.<sup>5</sup>

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<sup>5</sup> The Amans make additional assertions in their opening brief without argument or citation to authority, such as that the District's representative did not know his job very well and committed perjury, the District did not measure the actual amount of gasoline vapors that escaped from the storage system, and the Amans "were left with nothing" after the sale of the gasoline station. To the extent these are assertions of error, we deem them to be forfeited. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error. (*City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16; *In re Marriage of Nichols* (1994) 27 Cal.App.4th 661, 672-673, fn. 3.) When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.' (*Atchley v. City of Fresno* [(1984)] 151 Cal.App.3d [635,] 647; accord, *Berger v. Godden* [(1985)] 163 Cal.App.3d [1113,] 1117 ['failure of appellant to advance any pertinent or intelligible legal argument . . . constitute[s] an abandonment of the [claim of error'].)" (*In re S.C.* (2006) 138 Cal.App.4th 396, 408.)

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

\_\_\_\_\_, MAURO, J.

We concur:

\_\_\_\_\_, NICHOLSON, Acting P. J.

\_\_\_\_\_, BUTZ, J.